IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.165 OF 2006
WITH
CIVIL APPLICATION NO.1401 OF 2006
WITH
APPEAL FROM ORDER NO.166 OF 2006
WITH
CIVIL APPLICATION NO.50 OF 2006

Shri Manish Jagdish Kotak
son of Shri Jagdish Kotak ..Appellant.

V/s.

Shri Himanshu Kotak & Ors. ..Respondents.

Mr.K.R.Belosey i/b M/s.Pandey & Co., for appellant.

Mr.Nasurddin F. Dhillon i/b M/s.Hariani & Co. for respondent Nos. 1 to 4.

CORAM: A.M.KHANWILKAR,J

DATE : MARCH 20, 2006.

P.C. :

1. Heard counsel for the parties.

2. This order will dispose of both the appeals and civil applications filed in the respective appeals. The first appeal from order is filed questioning the correctness of the order dated 29th October, 2005 passed in Notice Of Motion No.4132 of 2005 in S.C.Suit No.4574 of 2005. Under the said order, the trial court appointed the Court Commissioner for making inventory of the articles

lying in the suit premises and after completing the procedure to seal the premises. Pursuant to that order, the Court Commissioner proceeded to the site and started procedure of inventory on 29th October, 2005 itself, as can be seen from the Commissioner's report dated 7th November, 2005. The inventory was completed at around 6.15 p.m. The defendant and his family members were present in the premises. They however, refused to move out of the premises. As a result, the Court Commissioner was required to remind the defendant that refusing to leave the suit premises is contempt of the court's order. The Court Commissioner requested the local police to extend necessary assistance for sealing of the premises. The local police however, took the stand that there was no specific order in that behalf passed by the trial court. In this backdrop, second Notice of Motion came to be filed by the plaintiffs being No.4133 of 2005 praying for order that the Court Commissioner be allowed to seek police assistance for removing person present in the suit flat and thereafter, seal the suit flat in terms of order dated 29th October, 2005. This Notice of Motion was filed on 9th November, 2005. In the mean time, however, the appellant had moved the present appeal from order challenging the order dated 29th October,

2005, appointing Court Commissioner and authorising the Court Commissioner to seal the premises. Appeal From Order was moved before the Vacation Judge on 2nd November, 2005 when the court clarified that the order of status quo would mean that the premises would be kept locked, which position obtained at the time of passing of the order dated 29th October, 2005. The fact that the premises are locked at the relevant time was observed from the communication sent on behalf of the appellant/defendant dated 12th September, 2005. That is noted in the order dated 2nd November, 2005. Thereafter, the second Notice of Motion taken out by the respondents/plaintiffs being Notice of Motion No.4133 of 2005 came to be heard and decided by the impugned order dated 10th November, 2005. This order is challenged in the second Appeal From Order. The court below in this order has noted that the earlier order passed by the trial court on 29th November, 2005 has been confirmed in the order passed by this court on 2nd November, 2005. In paragraph-11 of this order, the trial court has further adverted to the letter sent on behalf of the appellant/defendant on 12th September, 2005, which indicates that premises were closed at the relevant time itself. On this basis the trial court has made the second Notice of Motion No. 4133 of 2005

absolute by the order dated 10th November, 2005.

3. Counsel for the appellant contends that the appellant was in possession of the suit premises and the nature of order passed is throwing the appellant from the premises and such order being mandatory in nature cannot be sustained in absence of clear finding to support the ground for passing such order. The argument seems to be attractive. However, I am not inclined to accept the same in the fact situation of the present case. The court below has recorded its opinion at the ad-interim stage. The position that emerges from the letter dated 12th September, 2005 would indicate that premises were closed at the relevant time and the appellant was residing at some other premises in New Bombay. If this is the fact situation, nature of order passed will have to be upheld as at present. However, at the same time, the appropriate course to my mind, is to direct the trial court to decide the first Notice of Motion No.4132 of 2005 on its own merits in accordance with the law at the earliest. The trial court shall not be influenced by any opinion recorded in the order dated 29th October, 2005 or for that matter, 10th November, 2005 as well as the order passed on 2nd November, 2005 in Appeal from order No.165 of 2005.

4. In other words, disposal of these appeals from order is not an expression of opinion either way on the merits of the case or contentions available to the parties. Present position with regard to the suit premises will be maintained till the disposal of the Notice of Motion No.4132 of 2005 and seal on the premises in question will be removed on the appropriate order to be passed by the trial court at the time of disposal of the Notice of Motion.

5. These appeals as well as civil applications are disposed of on the above terms. The trial court shall decide the Notice of Motion in any event by end of April, 2006. Parties assure through their counsel that they will exchange pleadings before the trial court well in advance on or before 23rd March, 2006, so as to facilitate the trial court to dispose of the Notice of Motion on 27th March, 2006, when it is already slated for hearing.